	)	**IN THE UNITED STATES COURT OF**
	)	**MILITARY COMMISSION REVIEW**
UNITED STATES,	)	
	)	APPELLEE'S SUPPLEMENTAL BRIEF
Appellee,	)	ON SENTENCE APPROPRIATENESS
	)	
v.	)	CMCR Case No. 09-001
	)	
ALI HAMZA AHMAD SULIMAN,	)	Tried at Guantanamo Bay, Cuba
AL BAHLUL,	)	7 May 2008 – 3 Nov 2008
	)	before a Military Commission
Appellant.	)	convened by Hon. Susan J. Crawford
	)	
	)	
	)	Presiding Military Judge
	)	Colonel P. Brownback, JA, USA
	)	Colonel R. Gregory, USAF
	)	
	)	DATE: 9 November 2009

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW

Table of Contents

Table of Authorities

Cases

Statutes

Miscellaneous Authorities

Appellant's sentence, as approved by the convening authority, is fair, just and appropriate. This Court should, therefore, affirm the sentence.

Standard of Review

Pursuant to the Military Commissions Act of 2009 ("MCA"), Pub. L. 111-84, Title XVIII, 123 Stat -- , this Court "may affirm only . . . the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." 10 U.S.C. § 950f(d)(2009). This language is identical to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866. It is, therefore, appropriate to conclude Congress intended this Court to exercise the same authority to review sentences as exercised by the service courts of criminal appeal. Accordingly, this Court must itself be satisfied that the sentence is appropriate to this offender and his offenses. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

Argument

Appellant's sentence is fair and just given the character of the Appellant and the nature and seriousness of his crimes, and this Court should affirm the sentence, as approved by the convening authority.

I. Relevant Legal Principles

"Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). *See also United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005)(court must

determine whether sentence is fair and just). "Generally, sentence appropriateness should be judged by 'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *Snelling*, 14 M.J. at 268 (quoting *Mamaluy*, 27 C.M.R. at 180-81). While the appellate court may compare the sentences in other cases when reviewing a case for sentence appropriateness, *United States v. Wacha*, 55 M.J. 266, 267-68 (C.A.A.F. 2001), "[i]t is well settled that, except in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases, such as those of accomplices, sentence appropriateness should be determined without reference to or comparison with the sentences received by other offenders." *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985)(citing *Snelling, supra*, and *United States v. Olinger*, 12 M.J. 458, 460 (C.M.A.1982)). *See also United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999)(court not required to engage in sentence comparison except in rare instances in which appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases).

Before the court is required to engage in sentence comparison, Appellant must demonstrate that the cases to which he compares his own are, in fact, closely related cases, and that the sentences are highly disparate. *Lacy*, 50 M.J. at 288. Cases are "closely related" if they "involve offenses that are similar in both nature and seriousness, or which arise from a common scheme or design." *United States v. Kelly*, 40 M.J. 558, 570 (N.M.C.M.R. 1994). *See also Lacy*, 50 M.J. at 288 (cases are "closely related" where they concern, "e.g., coactors involved in a common crime, service members involved in a common or parallel scheme, or some other direct nexus between the service members whose sentences are sought to be compared"). If an

appellant demonstrates the existence of disparate sentences in closely related cases, then the Government must demonstrate a rational basis for the differences. *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001); *Lacy*, 50 M.J. at 288.

II. Analysis

As an initial matter, Appellant was sentenced to be confined for life, R. 992, not to confinement for life *without parole*, as argued in Appellant's Corrected Supplemental Brief on Sentence Appropriateness (hereinafter "Corrected Supplemental Brief"), at 1 and 3. To characterize Appellant's sentence as life without parole suggests parole is affirmatively prohibited, which is not the case. That a formal system of post-conviction clemency and parole has not yet been established for prisoners serving military commission sentences does not deprive the President of his authority to grant clemency or parole to Appellant. Further, nothing in the MCA prevents development of a clemency and parole system – the analogous court-martial clemency and parole system is largely a regulatory creation – and both common sense and the needs of detention-facility management suggest such a system is likely to formalize in time.

Next, Appellant compares his case to *United States v. Hamdan* and *United States v. Hicks*. He fails, however, to demonstrate either case is closely related to his own. First, his crimes are not similar in nature and seriousness to those of Hamdan or Hicks. Second, except in the broadest possible sense, they do not arise from a common scheme or design. While all three participated in the activities of al Qaeda, each committed distinct crimes unconnected by any

direct nexus to the actions of the other two. Further, the differences in their crimes and cases renders any comparison unhelpful in determining sentence appropriateness.

Hicks plead guilty, accepting responsibility for his actions. DoD Press Release No. 362-07: Detainee Convicted of Terrorism Charge at Guantanamo Trial, dated Mar. 30, 2007, *available at* http:// www. defenselink.mil/releases/release.aspx?releaseid=10678. By contrast, Appellant remained defiantly unrepentent. R. 966-80. Additionally, Hicks was involved in conventional fighting with the Taliban; Appellant was convicted of conspiring to commit, soliciting, and materially supporting terrorism against civilians and civilian targets.

Similarly, Appellant's case differs from the *Hamdan* case. Hamdan supported al Qaeda by training at one of their camps, driving and guarding Usama bin Laden, and transporting weapons or other supplies to Taliban or al Qaeda members and associates. Appellant, however, was a much more significant figure in al Qaeda, entrusted with principal responsibility for al Qaeda's war propaganda and recruiting efforts. Given the nature of the conflict with al Qaeda, Appellant's role was significantly more dangerous and insidious than that played by Hamdan, and likely to have a far greater impact. Further, unlike Hamdan, Appellant made it abundantly clear that he remained passionately committed to al Qaeda's violent *jihad* against the United States, which fact was relevant to both his rehabilitative potential and future dangerousness.

Appellant also argues his sentence is disparate from the average federal court sentence for murder and the average federal court sentence for terrorism related offenses. He makes no effort, however, to compare the details of his crimes to the particulars of the cases comprising the

comparison groups. Consequently, the comparison is of no help in determining the appropriateness of Appellant's sentence. A single murder, for example, might well be less serious than conspiring, and soliciting a multitude of others, to commit murder for terroristic purposes on a massive scale. Likewise, the range of conduct constituting material support for terrorism is quite broad, and without greater granularity on the cases comprising the average federal terrorism sentence cited, the average tells the Court essentially nothing about the appropriateness of Appellant's sentence.

Appellant next contends he was harshly sentenced "for producing a video, writing speeches and providing tech-support," and that "[t]he only allegation against [Appellant] even to imply violence was that he armed himself to avoid capture," which allegation was rejected by the members.[1] Corrected Supplemental Brief at 3. All the charges against Appellant, however, imply violence – he was convicted of (a) conspiring to **murder** protected persons, **attack** civilians, **attack** civilian objects, **murder and destroy** property in violation of the law of war, commit **terrorism**, and provide material support for terrorism, (b) soliciting others to commit these crimes, and (c) materially supporting an international terrorist organization. Appellant was a critical part of a coordinate effort – a conspiracy – to terrorize Americans through murder, violence and destruction. It matters little that his part in the terrorist project did not involve actually getting blood on his own hands.

Finally, Appellant argues that, because captured enemy combatants may be detained under the law of war, the traditional sentencing purpose of incapacitating the offender "is a

[1] The Government notes that Appellant was **not** charged with arming himself to avoid capture, but with arming himself "to protect and prevent the capture of Usama bin Laden."

minimal, if not irrelevant, objective of military commission sentencing." Corrected Supplemental Brief at 5. He is mistaken. Because law of war detention is merely a method to deprive the enemy of the means to wage war, detainees must be released when the conflict ends. Military commission sentences, by contrast, are penal sanctions for violating the law. As a matter of punishment, society is justified in imposing upon Appellant a punishment commensurate with the seriousness of his crimes. Further, though we cannot know when the conflict with al Qaeda will end, it certainly could end prior to Appellant completing his sentence. Because Appellant is guilty of having flouted the laws of war in the past, and has demonstrated a significant risk of doing so again in the future if released, society has a strong interest in his continued incapacitation, even after the current conflict ends. Accordingly, the Court should determine the sentence's appropriateness without regard to whether there is, or will be at any point in the future, an independent basis for detaining Appellant.

Conclusion

Appellant's sentence is fair and just, given the nature and seriousness of the offenses and the character of the accused. His role as a "media man," rather than rendering his culpability relatively less serious, as suggested in Appellant's Corrected Supplemental Brief, at 3, was actually especially pernicious. Through his special talents, Appellant solicited, recruited and motivated untold numbers of potential terrorists. As a result, he served as a force multiplier in a way that an individual accused providing material support through the provision of his own labor does not. Further, because Appellant's special contribution to al Qaeda was technical rather than physical, i.e. was a service he could perform for years to come, and because he remained defiantly unrepentent, Appellant presented a high degree of future dangerousness and low rehabilitative potential. The sentence imposed by the military commission reflects a sober

judgment of the seriousness of Appellant's crimes, his rehabilitative potential, and the needs of general and specific deterrence.

For the foregoing reasons, the Court should conclude that Appellant's sentence is fair, just and appropriate, and affirm the sentence, as approved by the convening authority.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent by electronic mail to Mr. Michel Paradis, detailed appellate defense counsel, on this 9th day of November, 2009.

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